No. 2628.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLMSTED-STEVENSON COMPANY,
a corporation,

Petitioner,

vs.

R. S. MILLER, Bankrupt,

Respondent.

In the Matter of R. S. MILLER, Bankrupt.

RESPONDENT'S BRIEF

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Filed this.....day of October, A. D. 1915.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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RESPONDENT'S BRIEF

Respondent has filed a motion herein to dismiss the Petition upon the grounds and for the reasons set forth in the motion (Record 36-37).

Without waiver of any of the grounds set forth in the motion, respondent submits that said petition does not state facts sufficient to entitle petitioner to the relief prayed or to any relief.

There does not appear in the record herein a statement of any findings of fact made by the District Court, if any were made, and it does not appear from the record whether the matter was heard in the lower Court solely upon the evidence taken before the Ref-

ree or whether other additional evidence was presented.

> "The record should include a statement of the findings of fact and conclusions of law by the court below, or its equivalent, and *not a certified copy of the evidence itself. The opinion of the court is not sufficient for this purpose,* and may only be referred to for the purpose of ascertaining what propositions of law governed the court in which the opinion was filed."
>
> *In re Richards,* 96 Fed. 935, 37 C. C. A. 634;
> *In re Taft,* 133 Fed. 511, 66 C. C. A. 385;
> *Steiner* vs. *Marshall,* 140 Fed. 710, 72 C. C. A. 103;
> *In re Pettingill & Co.,* 137 Fed. 840, 70 C. C. A. 338.

The record will not be considered where the transcript contains neither an agreed statement of facts nor findings of fact. (This was a petition for review of an order reversing an order of a referee disallowing a secured claim.)

> *Landing* vs. *San Antonio Brewing Assn.,* C. C. A., 5th Cir., 20 A. B. R. 226.
> "The allegation in the petition for review in this court is no evidence of such fact; nor is the allegation referred to put in issue. The Court is confined to the record attached to the petition or sent up in connection with the proceedings to review."
>
> *In re Rodarmour,* (C. C. A., 6th Cir.), 177 Fed. 379;
> *In re Boston Dry Goods Co.,* (C. C. A., 1st Cir.), 125 Fed. 226.

In the case last above mentioned it is said by the Court:

> "As we have already said, the petitioners assume that the opinion of the learned Judge of the District Court states the findings, rulings and orders of that Court. This, as we have said, forms no part of the record, so that there are no findings of that Court in any proper sense of the word. (The decree of the Court is general in its terms, not containing any findings.) The record discloses no application to the district court for specific findings of fact, so that in all respects, the record is as the petitioners saw fit to make it. In this particular case we should not undertake to revise the findings and conclusions of the Referee. The petition in this case is dismissed for the foregoing reason."

In re Pettingill & Co., supra, it is said:

> "This Court is not authorized to revise the findings of the Referee but only those of the District Court, and the record must contain a statement of the ultimate facts as will enable us to dispose of its proceedings on mere questions of law. The opinion filed by the judge does not present findings of fact of the character described in our decisions, unless made a matter of record by order of the Court in which it is passed down."

In re Taft, supra, it is said by the Court:

> "It is not unusual for the record to include the whole of the evidence instead of a statement of ultimate facts as found by the Referee or Judge, and this is improper *because this Court cannot review the evidence to determine the facts,* but is limited to reviewing the questions of law neces-

sarily raised and decided upon the facts found by the Court of Bankruptcy."

To the same effect see *Steiner* vs. *Marshall, supra.*

It seems to be the plan of petitioner here to ask this Court to decide as a matter of law that the evidence herein is insufficient to justify the order of the District Court. That the Court cannot do in this proceeding, for the reasons above stated, and for the further reasons that this Court cannot review the evidence because there is nothing in the record to show that *all* the evidence is contained therein.

Alkon vs. *United States,* (C. C. A. 1st Cir.) 163 Fed. 810.

PETITIONER IS ESTOPPED FROM NOW BRINGING FORTH THE MATTERS UPON WHICH IT SEEKS A REVISION.

It appears from the petition filed herein that in February, 1914, the petitioner was adjudicated a bankrupt (Petition 29); that in April he was discharged in bankruptcy, and thereafter the Referee in Bankruptcy made an order citing the bankrupt to show cause why he should not amend his schedule by incorporating therein a crop of wheat planted upon his United States homestead, and that he be required to deliver same to the trustee in bankruptcy.

The petition alleges among other things:

"XI.

"That at the time of filing the schedule of property owned by him as aforesaid, and at all times

thereafter, the said R. S. Miller, KNOWINGLY, AND FRAUDULENTLY, CONCEALED SAID PROPERTY, and KNOWINGLY AND FRAUDULENTLY FAILED AND NEGLECTED TO INCLUDE THE SAME IN THE SCHEDULE OF PROPERTY filed by him, and failed to surrender the same for the benefit of his creditors, and that said property was not delivered up or surrendered by said Miller, for the use and benefit of said creditors.

"XII.

"That neither your petitioner, nor any of its officers or employees had knowledge of the failure of said R. S. Miller to include said crop in his schedule of property until on or about the 18th day of September, 1914, etc." (Pet. 5-6.)

Upon these and other allegations issue was joined by the bankrupt, who, in addition to denying them, alleged, among other things:

"That at all the times mentioned in the answer, B. N. Stevenson was the secretary-treasurer of the Olmsted-Stevenson Company, and Jos. C. Smith was one of its attorney, representing its interests as a creditor of this bankrupt.

"That at the time of the filing of this bankrupt's petition and schedules, and at the time of his adjudication as a bankrupt therein, the said petitioner, Olmsted-Stevenson Company, and its agents and servants knew and ever since have known, that said crop was upon said lands and that this bankrupt owned and was in possession of said crop, and that the said Charles W. Conger, after his appointment and qualification as trustee herein as aforesaid, and prior to the making of an order by the said trustee, setting apart to this bankrupt his exemptions and prior to the date upon which this bankrupt was discharged as

aforesaid, well knew that said crop was upon said lands and premises aforesaid and that this bankrupt claimed to be and was the owner thereof, and that this bankrupt, after the appointment and qualification of said trustee and before the order setting apart to this bankrupt his exemptions, told said trustee that said crop was upon said lands and that he, the said bankrupt, was the owner thereof, and that said trustee before making said order, considered said matter and consulted with the said Olmsted-Stevenson Company, its agents, attorneys and servants, and was advised by the attorney for said Company that said crop was a part and portion of said real estate, and as such, belonged to the bankrupt, and that said trustee thereupon told the attorney for this bankrupt that said crop was a part of and admitted to be a part of said real estate, and as such exempt to said bankrupt, and that he would make an order setting apart to this bankrupt said real estate as exempt.

"That this bankrupt honestly believing that said crop was a part of said real estate, and as such was not entitled to be administered by said trustee for the benefit of said bankrupt's creditors herein, remained in POSSESSION OF SAID CROP, TOOK CARE OF, HARVESTING AND THRESHING SAID CROP AND EXPENDED LARGE AMOUNTS IN TAKING CARE OF, HARVESTING AND THRESHING SAID CROP, IN WORK, LABOR, MATERIALS AND MONEYS EXPENDED; THAT SINCE THE THRESHING OF SAID CROP, HONESTLY AND IN GOOD FAITH BELIEVING THAT SAID CROP WAS NOT ENTITLED TO BE ADMINISTERED FOR THE BENEFIT OF HIS CREDITORS HEREIN, has sold and disposed of a large portion of said crop and has laid out and expended the proceeds thereof, etc.

"That the said petitioning creditor herein, WITH FULL KNOWLEDGE OF ALL THE FACTS IN

THIS CASE AS AFORESAID, CONSENTED, ADVISED AND KNOWINGLY PERMITTED SAID TRUSTEE TO PROCEED WITH THE ADMINISTRATION OF SAID ESTATE AND SET ASIDE TO THIS BANKRUPT HIS EXEMPTIONS INCLUDING THE REAL ESTATE UPON WHICH SAID CROP WAS GROWING, AND TO PERMIT THIS BANKRUPT IN GOOD FAITH TO EXPEND HIS LABOR, TIME, MATERIAL AND MONEY IN TAKING CARE OF, HARVESTING AND MARKETING SAID CROP, AND THAT BY REASON THEREOF, SAID PETITIONING CREDITOR IS ESTOPPED FROM CLAIMING OR REQUIRING THIS BANKRUPT TO SURRENDER SAID CROP OR TO SURRENDER THE PROCEEDS OF SAID CROP IN ORDER THAT THE SAME MAY BE ADMINISTERED AND DISTRIBUTED TO THIS BANKRUPT'S CREDITORS HEREIN." (Pet., pp. 12, 15-17.)

Then follows allegations as to the value of the work, services, materials furnished and money expended by the bankrupt, and the value of the use of the land upon which the crop was grown, etc., in raising, maturing, harvesting, threshing and caring for the crop and showing its exempt character.

It will be observed that the charge made against the bankrupt by the creditor was fraudulent concealment of property and this is one of the grounds upon which the creditor might have opposed the discharge. Sec. 14, Bankruptcy Act; 32 Gen. Order in Bankr.

The objection now raised being open to the creditor when the bankrupt applied for his discharge and the bankruptcy law providing for the manner of making it, he has waived his right, and cannot now bring the matter forward after the discharge and without moving to set aside the order of discharge. This order

until revoked is binding and is *res adjudicata* not only as to every matter offered or received to sustain or defeat it, BUT AS TO ANY OTHER ADMISSIBLE MATTER WHICH MIGHT HAVE BEEN OFFERED FOR THAT PURPOSE. *Cromwell* vs. *Sac. County,* 94 U. S. 351, 24 L. Ed. 195.

In petitioner wanted to rely upon the matters set up in its petition, its remedy was to apply to the court to revoke the discharge. (Sec. 15, B. Act.)

> "THE SUMMARY JURISDICTION OF THE BANKRUPT COURT OVER THE PERSON OF THE BANKRUPT CEASES ON THE GRANTING OF HIS DISCHARGE FROM HIS DEBTS, AND HE CANNOT THEREAFTER BE REQUIRED BY SUMMARY ORDER TO SUBMIT TO EXAMINATION TOUCHING HIS PROPERTY ALLEGED TO HAVE BEEN CONCEALED OR FRAUDULENTLY TRANSFERRED."
>
> *In re Dole,* Fed. Case, No. 3964, 11 Blatch. 499;
> *In re Jones,* Fed. Case No. 7449;
> *In re Wittaski,* Fed. Case No. 17,920.

It is said in the brief of the petitioner that unless the bankrupt "has changed his position relying upon the non-action of this petitioner, so that the granting of the order would be inequitable, the question of laches amount to nothing."

No challenge to pleading or evidence by demurrer, objection or otherwise was made on this ground in the Court below, and it cannot be raised here for the first time.

A fair construction of the pleadings and evidence is that even before the filing of the bankrupt's peti-

tion at all and for several months afterwards, the petitioner and its agents and servants, know about the crop; it was disclosed at the first meeting of creditors, and the bankrupt then told Mr. Stevenson (the secretary-treasurer of petitioner—Pet. 8, 43) about it. (Pet. 70.) He told Mr. Stevenson about it before he filed his petition. (Pet. 60, 52-54.) The trustee asked Mr. Smith, attorney for petitioner, whether the crop was exempt and was advised that it was because a part of the real estate. (Pet. 63, 68.) In fact it was admitted by Mr. Smith that he gave advice that the crop was realty until severed from the ground. (Pet. 82-83.)

The petitioning creditor has had its day in court and its opportunity to appear and object to the bankrupt's discharge upon the same ground now urged. It was notified of the hearing upon the petition for discharge. (58a Bankr. Act.) The evident reason it did not then do so was because the crop had not at that time reached that state of maturity whereby it could be ascertained whether it would net a profit or a loss. Later in September, when it appeared that the crop would net a profit, these proceedings were instituted. Had it been a failure, would the petitioner have come forward and offered to compensate the bankrupt for his loss? Would it then have offered to pay the bankrupt the reasonable rental value of the land, or to pay him for his services and expenses? It is needless to say that in the event of a loss this proceeding would not have materialized.

What a monstrous equitable doctrine the petitioner advances. It asserts the right to stand in court first on one foot and then on the other. To speculate as to which position would be most advantageous to it.

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."
>
> *David* v. *Wakelee,* 156 U. S. 680, 39 L. ed. 578, 584.

It is not reasonable to suppose that the bankrupt would have harrowed he grain (Pet. 51) and have cared for it and harvested it unless he believed that the trustee would not claim it and that the petitioner would not claim it, and was he not justified in so believing, when its attorney had advised that it was exempt as a part of the realty? The bankrupt may rely not only on the evidence but upon all legal inferences from it.

Of course, the record does not show that the evidence is all here in this petition, or that no new evidence was introduced before the District Court. The certificate of the clerk fails to disclose that the evidence is full or complete. (Petition, p. 83.)

It is said in petitioner's brief "Whether the evidence introduced is sufficient to sustain the order sought to be reviewed is a question of law." Whether

there is any evidence is a question of law. The evidence cannot be weighed in this proceeding, for the reason that it is not shown to be all here, and further, the evidence is conflicting, and the nature of the proceeding will not permit of it. Only questions of law may be reviewed.

> *In re Grassler* vs. *Reichwold,* (this Court), 18 Am. B. Rep. 694.
>
> "All presumptions are in favor of the order, and where evidence is not in the record (or where the record fails to disclose that it contains all the evidence) it will be presumed the facts were sufficient to sustain the order, 'and finding'."
>
> *Alkon* vs. *U. S.,* (C. C. A.), 163 Fed. 810;
> *In re O'Connell,* 127 Fed. 838;
> Sec. 2951, Rem. Bankr.

The evidence could only be looked to to ascertain whether the findings were wholly unsupported, and not for the purpose of weighing the evidence or reconciling any conflict, and since there is no finding in the record, nor any agreed statement of facts, or any equivalent, it cannot be made to serve that purpose.

> *Hall* vs. *Reynolds et al.,* (C. C. A., 8th Cir.), 34 Am. B. Rep. 707-8.

It is conceded in petitioner's brief "That it would be only equitable and right that the bankrupt be allowed to retain out of the proceeds of this crop every dollar he has spent in caring for, harvesting and marketing the same, and reasonable compensation for and

time or labor expended, together with a reasonable rental for the land upon which this crop was growing. We have no doubt that he acted in good faith and upon the advice of his attorneys."

It might be added that the same advice was given by the petitioner's attorneys. (Pet. 63, 68, 82, 83.)

The answer to this is tersely and logically contained in the opinion of the trial court as follows:

> "It will not do to concede payment out of the crop for such of the bankrupt's land and labor. The Bankruptcy Act does not authorize either to be commandeered; and if the crop failed or was destroyed at harvest, from where would come this payment? The bankrupt having a right to exclusive use of his homestead land, no levy and sale could prevent him from lawfully replowing and reseeding the land after his bankruptcy petition was filed. To property of this evanescent quality no levy could attach. The case is distinguishable from those wherein it has been held that growing crops are so far personal property that though upon lands exempt by state law, they are subject to levy and sale; for in these latter the personal obligation of the owner of the land continues until after the crop is matured and severed, and the creditor, until paid, has claims upon the fruits of his debtor's exempt land and labor. In bankrupty it is otherwise. The debtor's personal obligation is extinguished at adjudication, and thereupon his exempt and after acquired property are free from creditor's claims though never paid. To the argument of possible injustice, in that a homestead entryman might devote such labor and money to put much land to crop, and then invoke bankrupty between seed time and harvest, it may be responded,—No more than if he erected buildings and fences, cleared, ditched and broke the

> land, none of which would inure to the benefit of his estate in bankruptcy."

It is said in petitioner's brief that "it was insisted in the court below that the trustee was the agent for the creditors and that he, the trustee, was guilty of such laches as to prevent him from claiming this crop as a part of the bankrupt estate, and that it appears from the opinion of the court below that he coincided with the view that the trustee was guilty of such laches as to bar petitioner."

Nothing is said about this in the opinion of the Court, except this:

> "Another sufficient reason for the conclusion herein is that, by standing by and permitting the bankrupt to devote his time, money and labor to maturing the crop as his own, the trustee is now estopped to claim it. He made his election. No fraud appearing, it is final, and concludes creditors. The bankrupt assumed all risk and hazard of failure, the trustee none, and in justice the former is entitled to whatever success was achieved. It goes without saying that, if the crop had failed, this proceeding would not have materialized, and no one would propose compensating the bankrupt for his loss."

It was not necessary for the court to find a strict agency between the trustee and creditors. The petitioner's secretary-treasurer, Mr. Stevenson, knew all about the crop, even before the petition in bankruptcy was filed. (Pet. 52-54-60.) The petitioner's attorney, Mr. Smith, knew about it, and advised the trustee that it was exempt "because it was a part of

the real estate." (Pet. 63, 68.) And the trustee does represent the creditors, he is elected by them, he stands to them in a fiduciary relation, he holds the estate primarily for them, and IT IS HIS DUTY TO FURNISH SUCH INFORMATION CONCERNING THE ESTATE AND ITS ADMINISTRATION AS MAY BE REQUESTED BY PARTIES IN INTEREST. B. Act, sec. 47 (a) 5.

In re Sauer, 122 Fed. 101;
In re Lowensohn, 121 Fed. 539;
In re Wrisley & Co., 133 Fed. 388 (C. C. A.).

The legal presumption is that he regularly performed his duty. The knowledge of the trustee is also the knowledge of the creditors. *In re Hansen,* 107 Fed. 252. There is nothing in either *In re Columbia Iron Works,* or *In re Allen etc. Co.,* cited by the petitioner, which in any way militates against this view.

In the Hansen case, *supra,* at page 254, the Court said:

> (Application to revoke discharge—to reach other property.)
>
> "Moreover, this petition comes too late. It is not claimed that any fraud has been perpetrated by Hansen upon the creditors, or that there has been any concealment by him in the premises. The trustee in bankruptcy represents the creditors. He was fully informed of all the facts in relation to Hansen's right. His information was that of the creditors by whom he was elected. I am convinced that these creditors, knowing all the facts, believed that Hansen had no right, in view of the adverse decision of the land office

> in this tract of land; and they were willing while the situation remained as it was, that Hansen should have his discharge in bankruptcy. The reversal of the decision of the local land office by the commissioner and the secretary of the interior accounts for the petition that has been filed. The application to set aside the discharge is denied."

To summarize: The petitioning creditor well knew all about this crop, even before the filing of the petition in bankruptcy; knew that it was not separately listed in the bankrupt's schedules; and that it was claimed as exempt by the bankrupt as a part of the homestead; that petitioner's attorney had so advised the trustee; that the trustee set aside the homestead as exempt, believing that the crop passed with it as a part of the exemption; that by the conduct of the petitioning creditor, its attorney, and the trustee, the bankrupt was led to believe that the crop was exempt as a part of the homestead, and thereafter he harrowed it, and devoted his time, labor and money, in maturing, harvesting and marketing it; that he was discharged in bankruptcy without any objection, so far as the record shows, on the part of the petitioning creditor.

Respondent, therefore, respectfully submits that the creditor having full knowledge of the facts and having stood by and permitted the bankrupt to devote his time, labor and money, in maturing, harvesting and marketing the crop, as his own, he has proven the allegations of his answer, to which no objection

was made below, that the petitioning creditor failed to prove the allegations of its petition, the trustee, who has succeeded to the legal title to the bankrupt estate, and the creditor, are estopped to now claim it. And that from their misleading silence with knowledge or passive conduct it became their duty to speak; that it was fair to equate their silence with a declaration that neither the trustee nor the petitioning creditor had any interest in the planted crop.

Bigelow on Estoppel, Sec. 4, p. 648 (6th ed.).

And this defense is favored by the federal courts.

Lasher vs. *McCreery,* 66 Fed. 834, 840;
St. Paul etc. R. Co. vs. *Sage,* 49 Fed. 315, 326, 1 C. C. A. 256;
Halstead vs. *Grinnan,* 152 U. S. 412, 14 Sup. Ct. 641, 38 L. Ed. 495.

As stated in the third and fourth grounds of the motion to dismiss, the petition to revise on this ground, involves the decision of a controverted issue of fact, which cannot be decided in this proceeding; and the facts are not before the court from which the court below drew its conclusions of law, or made its order, stated as the seventh ground. (Pet. 36-37.) For these reasons the motion to dismiss the petition should be sustained.

Without waiver of the foregoing reasons why the motion to dismiss the petition should be sustained, respondent submits that the question, WAS THE GROW-

ING CROP OF WHEAT AN ASSET OF THE BANKRUPT WHICH PASSED TO THE TRUSTEE FOR THE BENEFIT OF CREDITORS, should be answered in the negative.

In the petitioner's brief it is claimed that because a growing crop can be mortgaged, it is, therefore, property the title to which vests in the trustee by operation of law under the Bankruptcy Act, but this begs the question, for if the property is exempt, then the Act itself excepts it from its operation, and it does not pass to the trustee. (Sec. 70 B. A. s. d. (a). Exempt property does not pass to the trustee in bankruptcy, nor does it become a part of the estate for distribution among the creditors.

Bank of Nez Perce vs. *Pendel,* (this Court), 193 Fed. 917;
Lockwood vs. *Exch. Natl. Bank,* 190 U. S. 294, 47 L. ed. 1061.

Moreover, exempt property may be transferred or mortgaged, but that is not determinative of whether or not it is exempt.

It is conceded that the United States homestead is itself exempt. But if the reasoning of the petitioner were logically carried out, it would not be exempt, because it may be mortgaged and the mortgage would be valid even if made before receiver's receipt. *Fuller* vs. *Hunt,* 48 Iowa 163;*Lang* vs. *Morey,* 40 Minn. 396.

Forgy vs. *Merryman,* 14 Neb. 513;
Orr vs. *Ulyatt,* 23 Nev. 134;
Spiess vs. *Neuberg,* 71 Wis. 279;
Klemp vs. *Northrup,* 137 Cal. 414.

It said that the Supreme Court of Montana has recognized the right to mortgage growing crops. But the courts of all the states recognize the right of a homesteader on public lands to mortgage the homestead before patent.

Please see the decisions from the different states cited in note to Sec. 2296, Vol. 6, Fed. Stat. Ann., p. 308.

And if mortgageability of the crop is to be the test, then the homestead would not be exempt. The reasoning applies with equal force to one as well as the other.

It is also said by petitioner in his brief that growing crops are not mentioned in the statute of exemptions of the State of Montana. Neither is United States homesteads. But seed and grain, not exceeding in value the sum of $200, actually provided or on hand, for the purpose of planting or sowing the following spring is mentioned as exempt. Rev. Codes Mont. 1907, sec. 6825. Is the grain any the less exempt because planted?

The Court's attention is called to Sec. 2296, Rev. St., Vol. 6, Fed. St. Ann., page 307, which reads:

> "(Homestead lands not subject to prior debts.) No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor."

Residence upon the land and cultivation are by the federal statutes made conditions precedent to patent. Failure to perform these conditions causes the land to

revert to the government. Since the entryman must reside upon the land, he must be allowed to make a living by tilling the soil, and it was, unquestionably the intention of Congress that there should be included in the exemption the beneficial use of the land. A failure to reside on the land causes the land and crop growing thereon to revert to the United States. *And this distinction is important, as marking the difference between this character of a homestead and that allowed under state statutes.*

It is said by petitioner in its brief that the crops may be sold, mortgaged, seized and levied upon. The cases cited do not involve the question of a crop upon United States Government homestead.

It is said by petitioner:

> "It is impossible for us to understand why any difference should exist between the land held under homestead entry and land held under contract of purchase from an individual only. Unless the contract is complied with in the latter case the person loses the possession of the land, while in the former case he loses possession by failure to comply with the homestead law. The legal effect of non-compliance is the same in each case."

It is also said:

> "It is difficult to understand why any distinction should be made between this case and one where crops are growing on the statutory homestead, which is exempt under the bankruptcy act. In such instance no creditor could claim that the land passed to the trustee. No creditor would

> have the right to the labor of the bankrupt and maturing, harvesting and marketing the crop, yet the authorities are uniform in holding that in such cases the title to the crop would pass to the trustee."

It occurs to us that there is a vast difference in the two cases. The state homestead is created upon property already possessed by the beneficiary. The federal homestead is donated to him by the government on certain conditions, while the state homestead is exempt from ordinary debts of the owner contracted after notice and not from antecedent debts, the federal homestead is exempt from debts antecedent to the acquisition of title and not from those subsequent. Land is donated to the settler on the condition of limitations prescribed by the statute, provides for occupancy, cultivation, etc. The principles governing the benefits conferred under the homestead laws of the United States are other than those controlling state exemptions. From the date of entry to that of patent, the homestead is not liable for any debts of the occupant for the reason that he does not own it. Title is in the United States. *A private citizen in making a contract with an individual cannot confer land in fee simple upon a donee* which shall not be liable for the latter's debts; cannot make non-liability a condition for he has no control over the subject, but the United States can, and does, donate its public land to settlers and makes the property free from existing debts. The exemption is based upon the prin-

ciple of the sovereign right to protect the donation after it has been bestowed. This the individual has no right at all to do. The government, therefore, has the right to exempt the homestead from anteedent debts after ceasing to own it. The individual has not.

The United States statute has been construed " to be manifestly intended for the protection of the entryman, to prevent the appropriation of the land *in invitum* to the satisfaction of debts incurred anterior to the issuance of patent."

Lewis vs. *Wetherell,* 36 Minn. 386;
Orr vs. *Stewart,* 67 Cal. 275.

It has been generally held that all improvements made by the settler become a part of the real estate so that a mechanic's lien for work and labor does not create a lien upon the property or the building, for the settler has yet no title and the government does not become the debtor of the mechanic.

Waples on Homestead & Exemption, Sec. 10, p. 952.

The statute concerning homesteads, like other statutes of exemption, is founded upon considerations of public policy, beneficial in their nature, and is therefore to be liberally construed in furtherance of the object intended to be attained.

Thompson on Homesteads, Secs. 4, 7, and authorities there cited.

In determining what constitutes a homestead exemption the reason and spirit of the law must be considered, and such construction given as will include, within the exemption all things coming under that reason and not contrary to the letter of the law, while excluding all things not within that reason, even though apparently within the law. In conformity with this rule, the courts have always been liberal in ascertaining the extent of this exemption, so as to carry the legislative intent into effect. The object of the homestead exemption is not merely to afford a naked shelter to the family, but like all other exemptions to afford it a means of livelihood and thus to prevent its members from being driven by destitution to seek a support from public charity. The policy of the law in this country has always been, so far as possible, to prevent persons, whether through misfortune or improvidence, from becoming a charge upon the public purse; and, to this end, the statutes of exemption have been so framed as to secure to all persons the means of obtaining a support through their own exertions. In view of this fact, it would be absurd to suppose that the Congress intended that, though the land constituted a homestead, the owner should not be allowed to use it for any useful purpose, and if the products of such farm were not exempt then all motives for exertion are withdrawn in the very cases to which the statute was intended to apply, viz.: those in which the owners are in impoverished circumstances.

To construe the federal statute as contended for by the petitioner here would not only defeat its manifest object, but would convert it into an instrument of fraud and oppression.

Upon the theory of petitioner a man might invest $5000 in a splendid and luxurious mansion, and place it beyond the reach of his creditors, but if he has a little farm worth $1000 and is content with the humble shelter of a cottage he dare not raise food for his hungry family upon those premises without allowing a rapacious creditor to seize it before it can be used. To so hold would make the statute a mockery.

The exemption laws in the State of Montana have always received a liberal construction by the highest court of that state.

> *Ferguson* vs. *Speith,* 13 Mont. 487, 34 Pac. 1020, 1021, 1022;
> *Lindley* vs. *Davis,* 7 Mont. 206, 14 Pac. 717, 720,

at which page it is said:

> "A late senator, in advocating in the United States Senate the adoption of the general homestead law, said: 'Tenantry is unfavorable to freedom. It lays the foundation of separate orders in society, annihilates the love of country, weakens the spirit of independence. The tenant has, in effect, no country, no hearth, no domestic altar, no household God. The freeholder is the only supporter of the free government, and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply their tenants.' "

The cases cited in petitioner's brief to the effect that growing crops are not exempt, but that they pass to the trustee in bankruptcy, are not convincing in support of the proposition contended for by petitioner and all involve the question of the bankrupt's right to the growing crops upon his homestead held under the laws of the state in which he resided.

In re Sullivan corn was matured at the date of bankruptcy and this, as well as other authorities, make a distinction between crops which are matured and those which depend upon the soil for its nourishment and support, as in the case of *Ellithorpe* vs. *Reidesil,* 71 Iowa 315, 32 N. W. 238, in which it was determined that an execution could not be levied upon *immature* growing crops. The Court observes:

> "The whole proceeding was on the theory that the crops were personal property and could be levied on and sold as such. But while they remained immature and were being nurtured by the soil, they were attached to and constituted part of the realty. They could no more be levied upon and sold under execution as personalty than could the trees growing upon the premises."

The Court further said:

> "It has been well observed that the value of the growing crops depends upon the soil for its nourishment and support, and, if disconnected at once, as in this case, would be nothing and levy and sale usually afford but little return to the creditors, while it is sometimes serious loss to the debtor."

In re Daubner, so far as the crops on the homestead were concerned a patent to the lands had been issued prior to the proceedings in bankruptcy, and crops were claimed as exempt under the state homestead laws.

The case of *In re Hoag* involves the question as to the bankrupt's right to crops growing upon land set apart and claimed as exempt under state homestead laws.

The rule is laid down as to the extent and scope of the exemption in 21 Cyc. 497, as follows:

> "The exemption extends to crops growing upon the land, and according to some decisions to crops which have been severed therefrom. Others, however, hold that the crops are exempt only so long as they are not severed from the soil."

See, also, to the same effect, the following cases:

McCullough Hardware Company vs. *Call,* 155 S. W. 718 (Tex. Civ. App.);
Neblett vs. *Shackelton,* 69 S. E. 946 (Va.);
Coats vs. *Caldwell,* 71 Tex. 19, 8 S. W. 922;
Morgan vs. *Rountree,* 88 Ia. 249, 55 N. W. 65;
Jewitt vs. *Guyer,* 38 Vt. 209;
Cox vs. *Cook,* 46 Ga. 301;
Alexander vs. *Holt,* 59 Tex. 205;
Parker vs. *Hale* (Tex. Civ. App. 1903), 78 S. W. 555;
Staggs vs. *Piland,* 31 Tex. Civ. App. 245, 71 S. W. 762;
Allen vs. *Ashburn,* 27 Tex. Civ. App. 239, 65 S. W. 45;
Cunningham vs. *Coyle,* 2 Tex. Civ. App. cases, Sec. 422;

Citizens Nat. Bank vs. *Green,* 78 N. C. 247;
In re Wood, 147 Fed. 877;
In re Cohn, 171 Fed. 568;
Waples on Homestead & Exemption, p. 242.
15 A. & E. Enc. Law, 593.

In re Wood it was claimed that only such exemptions in bankruptcy were available as provided by the state law, and the Court finds against this narrow construction.

In the case of *Coats* vs. *Caldwell, supra,* the Court says:

> "Upon a levy upon such property the officer must either take possession of the land to gather the crop or must sell it ungathered. In the latter case, the right would pass to the purchaser at the sale to go upon the land and take off the crop. *In order to complete a sale or to make it effective, possession* MUST BE TAKEN OF THE LAND UPON WHICH THE CROP IS FOUND, AND FOR A TIME AT LEAST THE OFFICER OR PURCHASER MUST EXERCISE DOMINION AND CONTROL OVER IT. THIS, IN OUR OPINION, IS AN INVASION OF THE HOMESTEAD RIGHT, AND CANNOT BE PERMITTED."

In the case of *Neblett* vs. *Shackelton, supra,* the Court says:

> "Unless these decisions (referring to certain decisions holding that crops severed from the soil of a homestead are not exempt from execution) are governed by something in the statutes of the states referred to, they strike us as being narrow and technical in the extreme. Of what value unpicked cotton could be to the householder it is difficult to perceive. As long as it remained in the field exposed to the weather and to be utterly wasted, it was protected by the

> homestead, but as soon as it was picked and assumed a useful and marketable form, the protection of the homestead was withdrawn and it became subject to seizure by the creditor."

It was pressed upon the Court in *Citizens' Bank* vs. *Green, supra,* that a homestead having been secured to the debtor by law, all income derived from its use is merely an incident which follows the principal and belongs absolutely to him, and may be used in improving the property or any other improvements, and that unless this be so the law rather discourages than invites improvement and enterprise by cutting off all inducements to industry, the legitimate rewards of which, when in excess of the exemption, would be seized and sold by the creditor.

> "That this is true cannot be successfully refuted, and the answer which was made by the Court does not appeal to us. We have no fear that colossal fortunes in defiance of debts past or future will be built up upon the nucleus of incomes derived from a capitalization and recapitalization of the proceeds of crops derived from lands set apart as homesteads."

The Supreme Court of Iowa, has had this subject under consideration in *Morgan* vs. *Rountree,* 88 Iowa 249, 55 N. W. 65, and also reported in 45 Am. St. Rep. 234, where the conclusion was reached that moneys due for rent of a homestead are exempt from execution. In the course of the opinion, the Court said:

> "We think it is in harmony with the evident spirit and purpose of our statute to hold that the

head of a family owning a homestead has a right to hold as exempt not only the homestead and its use, but also crops or money which he may derive from its use while the property continues to be his homestead. If the homestead is terminated by abandonment or otherwise, the exemption ceases. To hold that the owner of a homestead can only hold as exempt such proceeds of its use as the industry of himself or family has produced would be in many cases to deny the benefits of such exemption entirely. Take the case of an owner who cannot, from any cause, cultivate the homestead garden of 40 acres; there is no good reason why he may not rent them to another, and hold the proceeds exempt for the use of his family. This case furnishes another apt illustration; also the case of one having a spare room in the homestead, who takes lodgers, or one who, having no use for a stable on the homestead premises, rents it to another. We are clearly of the opinion that proceeds derived from the use of the homestead while it remains such are exempt to the head of a family. Whether property purchased with such proceeds, not otherwise exempt, would be subject to execution wo do not determine."

This case derives additional value from having been annotated by Mr. Freeman, who in a note says in part as follows:

"As to certain leases of homestead, the object of the statute is not restricted to affording a mere shelter to the family; and perhaps there is no class of which it may fairly be said that the statute did not intend the debtor to have the advantage accruing from the profitable use of the homestead for such purposes as it might be devoted to without impairing its homestead character or aban-

doning all exemption rights therein. The principal case goes further than any other falling within our observation in securing to a debtor the profits of his homestead, accruing when he was absent therefrom. We are not inclined to doubt or criticise it on that account. The claimant has a right to the full use of his homestead, and if he denies himself part of this right and thereby becomes entitled to compensation, as when he lets the whole, or some part of it, the courts, in denying creditors the right to garnish or otherwise subject to execution the proceeds of such letting, inflict no wrong on the creditor. *A case, equitably still less subject to doubt, arises when the owner of an agricultural homestead plants and harvests a crop which his creditor undertakes to seize in satisfaction of a debt. By not restricting such a homestead to the dwelling house and its appurtenances, and in permitting it to extend over lands useful only for the production of crops, the Legislature impliedly expressed an intention to include the beneficial use of those lands in the homestead exemption.* It is true that in many instances there is an enumeration of the personal property which a debtor is entitled to retain as exempt from execution, and that the produce of the homestead may exceed this enumeration or be of a different character. Hence some courts have denied that the produce, unless of a character or quantity which would exempt it, is exempt though it had been acquired from other sources. Others affirm that the exemption of a homestead extends to the crops grown thereon."

It would be inconsistent for the government to say to a homestead entryman, you must live hereon, you must cultivate this land and raise crops hereon, you must devote your time, energy and labor and what-

ever capital you may be able to command in making a living for yourself and those dependent upon you upon this land, and at the same time say to him, your creditors can confiscate your crops which you plant, can deprive you of the living which we require you to make upon this land, can by taking charge of your growing crops prevent you from devoting your labor to the improvement upon this land and making a living for yourself and those dependent upon you.

For the reasons hereinbefore stated respondent respectfully submits that his motion to dismiss the petition to revise should be sustained or an order of this Court made affirming the order of the District Court of the United States for the District of Montana.

Respectfully submitted,

L. P. FORESTELL,

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